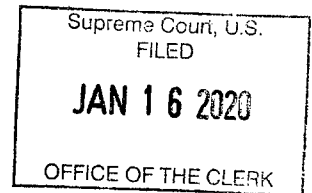


No. 19-8083

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

Antwune Washington — PETITIONER
(Your Name)

vs.

State of Mississippi — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Mississippi Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Antwune Washington
(Your Name)

P.O. Box 88550
(Address)

Pearl, Ms. 39288-8550
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- I. Defendant received ineffective assistance of counsel where facts of the case raised issue of necessity, and trial counsel did not request a special instruction thereon. U.S.C.A. 6.
- II. On claim of ineffective assistance of counsel, reviewing court must first decide whether trial counsel's performance failed to constitute reasonably effective assistance and, if so, it must be decided whether there is reasonable probability that result of trial would have been different but for counsel's deficient performance, with "reasonable probability" being defined as probability sufficient to undermine confidence in the outcome. U.S.C.A. Const. Amend. 6.
- III. Justification of necessity is not excluded as a defense to the offense of possession of a firearm by a felon, nor has it been excluded as a defense when an offense is enhanced.
- IV. Evidence in prosecution for possession of a firearm by felon was sufficient to raise issue of necessity, so that defendant would have been entitled to instruction thereon upon request, in light of defendant's testimony that he was target.
- V. Defense counsel who fails to raise a defense may be ineffective despite absence of case law as to availability of defense at time of trial, where defense is specifically



VI. Indictment which alleged that defendant attempted to commit bodily harm against patrolman, but did not set out any alleged overt act comprising that attempt, was fatally defective. Code 1972, §97-37-5.

VII. Indictment which alleged that defendant attempted to commit bodily harm against patrolman, but did not set out any alleged overt act comprising that attempt, was fatally defective. Code of 1972, §97-37-5.

VIII. Defendant indicted for aggravated assault under subsection requiring purposeful and willful and knowing actions and convicted upon jury instruction permitting conviction for recklessly causing serious bodily injury under circumstances manifesting extreme indifference to value of human life was entitled to reversal of conviction; instruction given reflected new indictment which was not contained in original indictment and were apparently basis for jury verdict, as jury inquired of court after it had retired as to meaning of specific language, but court has no power to amend indictment as to matter of substance without concurrence of grand jury.

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Antwaine Washington, Appellant
2. Dennis L. Bisnette, Assistance Prosecutor
3. Hon. Dal Williamson
4. John Anthony Piazza.

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

STATUTES AND RULES

OTHER

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional And Statutory Provisions Involved

I. Procedural History.

On or about the 1st day of October, 2016 A.D., did unlawfully, willfully, recklessly and feloniously, cause bodily injury to another, Eric Drummond, by shooting him in the chest with a 22 caliber handgun, a deadly weapon, or means likely to produce death or serious bodily harm in Count I of the indictment.

Count II: Possession of Firearm by Felon

On or about the 1st day of October, 2016 A.D., did willfully, unlawfully, feloniously and knowingly possess and/or carry, in whole or in part, a firearm, a 22 caliber handgun, and having been previously convicted and sentenced of the felony crime of Possession of Cocaine (77.3 grams) on the 17 of January, 2011, in Cause No. 2008-257-KR2 in the Second Judicial Circuit Court of Jones County, Mississippi, in violation of Mississippi Code Annotated Section 97-37-5 (1972), and contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi. (See necessity defense).

Necessity Defense (necessity). 1. Criminal law. A justification defense for a person who acts in an emergency that he or she did not create and who commits a harm

that is less severe than the harm that would have occurred but for the person's actions.

Manifest necessity. Criminal prosecution. A sudden and overwhelming emergency, beyond the court's and parties control, that makes conducting a trial or reaching a fair result impossible and that therefore authorizes the granting of a mistrial.

Constitutional And Statutory Provisions Involved

This case involves Amendments V, VI, and XIV to the United States Constitution, which provide; United States Constitution:

1. Improper indictment;
2. Double jeopardy;
3. Self-incrimination;
4. Due process;
5. Speedy trial;
6. Trial by jury;
7. Confront witnesses;
8. Assistance of counsel

State Constitution:

1. Improper indictment; Article 3, Sec. 27;
2. Double jeopardy; Article 3, Sec. 22;
3. Self-incrimination; Article 3, Sec. 26;
4. Due process; Article 3, Sec. 14;
5. Speedy trial; Article 3, Sec. 26;
6. Trial by jury; Article 3, Sec. 26;
7. Confront witnesses; Article 3, Sec. 26;
8. Assistance of counsel; Article 3, Sec. 26.

Statement Of The Case

Appellant asserted in the Mississippi Supreme Court and urges herein that "his trial counsel was ineffective because he failed to research the law regarding the defenses available, ... pursued a defense that was unavailable (self defense), and did not urge the only defense raised by the evidence, namely, the defense of necessity." Vasquez, at 558. Specifically, appellant argues that his counsel should have requested the trial court to instruct the jury on the defense of necessity. This Court should agree.

1. Defendant received ineffective assistance of counsel where facts of the case raised issue of necessity and trial counsel did not request a special instruction thereon. U.S.C.

A. Const. Amend. 6.

Appellant asserted in the Supreme Court and urges herein that "his trial counsel was ineffective because he failed to research the law regarding the defense available, ... pursued a defense that was unavailable (self-defense), and did not urge that the only defense raised by the evidence, namely, the defense of necessity." *Vasquez*, 796 S.W.2d at 558. Specifically, appellant urges that his counsel should have requested that trial court to instruct the jury on the defense of necessity. This Court should agree.

2. The claim of ineffective assistance of counsel, reviewing courts must first decide whether trial counsel's performance failed to constitute reasonably effective assistance and, if so, it must be decided whether there is reasonable probability that result of trial would have been different but for counsel's deficient performance, with "reasonable probability" being defined as probability sufficient to undermine confidence in the outcome. U.S.C.A. Const. Amend. 6.

The proper standard by which this Court review the adequacy of representation at the guilt-innocence stage of a trial is that articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and adapted by this Court in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Cr. App. 1986) (See also *Ex parte Walker*, 777 S.W.2d 427, 430 (Tex. Cr. App. 1989).

Strickland requires a two-step analysis. First, the reviewing

court must decide whether trial counsel's performance failed to constitute "reasonably effective assistance." Put another way, the question is whether the attorney's representation fell below an objective standard of reasonableness under prevailing professional norms? *Id.* If the attorney's performance did fall below the accepted standard, it must then be decided whether there is a "reasonable probability that the result would have been different," but for counsel's deficient performance.

Id. Strickland defines a "reasonable probability" as "probability sufficient to undermine the confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed. 2d at 698.

Indeed, this Court has held that necessity is a defense available to a defendant charged with the lesser included offense of unlawfully carrying a weapon. Johnson v. State, 650 S.W.2d 414 (Tex. Cr. App. 1983); Armstrong v. State, 653 S.W.2d 810 (Tex. Cr. App. 1983); and Hangel v. State, 534 S.W.2d 698 (Tex. Cr. App. 1976).

The legislature has not excluded the justification of necessity as a defense to the offense of possession of a firearm by a felon.

3. Defense counsel who fails to raise a defense may be ineffective despite absence of case law as to availability of defense at time of trial, where defense is specifically recognized by statute. U.S.C.A. Const. Amend. 6.

This Court found that the defense of necessity is available in a prosecution for possession of a firearm by a felon under appropriate facts. The Court held, however, that in the absence of case law at the time of trial holding that necessity is a defense

to this offense ... and in view of the totality of the representation of appellant ... we find that appellant was not afforded reasonably effective assistance of counsel." As to those defenses which are recognized by statute, this Court's opinion is correct,¹ but incomplete. In this case there is a specific

(1) We combine this with the common sense realization that just because a competent defense attorney recognizes that a particular defense might be available in a particular offense, he or she could also decide it would be inappropriate to propound such defense in a given case. Although Strickland mandates that we should not second-guess that strategy, we state without hesitation that the failure to seek an instruction on necessity would not have been acceptable trial strategy under the facts of this case.

statute to be considered.

This Court found that the defense of necessity is available in a prosecution for possession of a firearm by a felon, under appropriate facts. This Court held, however, that "in the absence of case law at the time of trial holding that necessity is a defense to this offense ... and in view of the totality of the representations of appellant ... we find that appellant was not afforded reasonably effective assistance of counsel."

Under the facts of this case, it would have been error for the trial court to refuse such an instruction, had one been requested. Counsel's performance in not seeking the instruction was clearly deficient. Appellant's ground for review is sustained.

(2) From the record it appears that counsel failed to conduct any independent investigation into the facts. Additionally, it appears that counsel had not fully researched the law regarding the offense, as evidenced by his total lack of awareness about which defenses, if any, were available to his client, and that he advised the trial court that his representation of a defense came from appellant's research in Corpus Juris. Finally, after trying unsuccessfully several times to present evidence regarding the alleged gun possession, his attorney had failed to request a jury instruction on "necessity defense".

As discussed above, Strickland requires a two-step analysis by the reviewing court.

Because the evidence did raise the defensive issue of necessity, and because appellant's counsel failed to request a jury instruction on the issue, the jury was precluded from giving effect to appellant's defense. That in itself undermines our confidence in the conviction sufficiently to convince us that the result of the trial might have been different had the instruction been requested and given.

Accordingly, this court should reverse the judgment of the Circuit Court of Jones County, Mississippi; the defendant is remanded to the custody of the Sheriff of Jones County to answer to the indictment herein.

4. Indictment which alleged that defendant attorney who failure to demur to indictment did not prevent objection to indictment on appeal, where, prior to trial, defendant asked

his counsel to file a motion to quash indictment which fully informed Court of defect and indictment was substantially defective. Code 1972, § 99-39-21.

As stated previously, appellant, prior to trial asked his attorney to file a motion to quash the indictment. Counsel did not file a demurrer under the provisions of MCA § 99-7-21 (1972). The Mississippi Supreme Court held, however, that a demurrer is necessary only when there is a formal defect in the indictment that can be amended and does not apply when the indictment defect is substantive. Marie v. State, 330 So. 2d 277 (Miss. 1976). Here in the case sub judice the Court would have been fully informed of the indictment's defect by appellant's motion to quash. This Court held that the indictment was substantially defective in that it did not set out any alleged overt act whatsoever regarding appellant's to cause bodily harm to Eric Drummond. Appellant, as hereinbefore discussed, was Constitutionally entitled to be advised of the overt act or acts comprising his action. It is therefore necessary under the law that this Court reverse and remand the cause for proper indictment and trial thereunder.

5. State can prosecute only on indictment returned by grand jury, and the court has no authority to modify or amend. Indictment in any material respect.

In this case, the petitioner, Antwone Washington, was indicted in Jones County, Mississippi, on June 16, 2017, for aggravated assault, specifically charging the violation of Miss. Code Ann. § 97-37-3 in that he:

Count II: Possession of Firearm by Felon

In said County, District and State, on or about the 1st day of October, 2016 A.D., did willfully, unlawfully, feloniously and knowingly possess and/or carry, in whole or in part, a firearm, a 22 caliber handgun, after having been previously convicted and sentenced of the felony crime of Possession of Cocaine (77.3 grams) on the 19th day of January, 2011 in Cause No. 2008-257-KR2 in the Second Judicial Circuit Court of Jones County, Mississippi (see "Exhibit A"), and has received no pardon or relief therefrom;

in violation of Mississippi Code Annotated Section 97-37-5 (1972), as amended, and contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi.

It is very clear that, from the beginning, the people of Mississippi have ordained that they not be prosecuted for felonies except upon the indictment by a grand jury. It has been the law since 1858 that the court has no power to amend an indictment as to the matters of substance without the concurrence of the grand jury by whom it was found, although amendments as to mere informality may be made by the court. Mc Guire v. State, 35 Miss. 366 (1858). See also Miller v. State, 53 Miss. 403 (1876); Peel v. State, 55 Miss. 434 (1877); Bleumenberg v. State, 55 Miss. 528 (1878). Later cases cited by the appellant include Van Norman v. State, 365 So.2d 644 (Miss. 1978) and Kemp v. State, 121 Miss. 580, 83 So. 744 (1920). These cases clearly support the rule above quoted that the State can prosecute only on the indictment returned by the grand jury and that the court has no authority to modify or amend the indictment in any material respects.

6. Defendant indicted for aggravated assault under subsection requiring purposeful and willful and knowing actions and convicted upon jury instructions permitting conviction for recklessly causing serious bodily injury under circumstances manifesting extreme indifference to value of human life was entitled to reversal of conviction; instructions given reflected new indictment which was not contained in original indictment and were apparently basis for jury verdict, as jury inquired of court after it had retired as to meaning of specific language, but court has no power to amend indictment as to matter of substance without concurrence of grand jury.

The Court held here that when the grand jury returned this indictment under sub-section (b) requiring purposeful and willful and knowing actions, that stated the charge upon which this defendant could be tried. When the proposed amendment was offered to allow the jury to convict under section (a) of the statute to include recklessly causing serious bodily injury under circumstances manifesting extreme indifference to the value of human life, this proposed a change of substance and not of form. There can be no doubt that the jury acted under the language contained in the proposed amendment because it inquired of the court, after it had retired, as to the meaning of that language. Further, the trial court had some difficulty with the matter, and commented as follows:

This court does have some problem with this issue in that the indictment not only charged the offense of aggravated assault but it charged the particular method and factual situation behind such charge. The factual

situation did not have any reference to reckless indifference and the indictment even spelled out the violation being charged as coming under the Section 97-3-7(2)(b) of the Mississippi Code. This Section does not cover reckless indifference which, in fact, is covered by a completely different sub-section.

Statements Of The Case.

The jury instruction (~~with~~) D-7, **D-18-4** if you find from the evidence in this case that Mr. Washington's act of shooting was committed while resisting Eric Drummond's attempt to unlawfully shoot Antwone Washington or commit a felony against Antwone Washington was occupying a vehicle when you shall find Antwone Washington not guilty of shooting Eric Drummond's.

It is presumed that Mr. Washington reasonably feared imminent death or great bodily harm, or the commission of a felony upon him or another or against the vehicle which Mr. Washington was occupying, if you find that Eric Drummond was in the process of unlawfully and forcibly entering the vehicle occupied by Mr. Washington at the time of the shooting. The jury instruction D-3, D-4, D-5 and D-8 instructed that recklessly under circumstances manifesting extreme indifference was an aggravated assault and it became an element of the crime charged even though it was not contained in the indictment. This Court is aware that the defense was surprised and caught off guard with the reckless indifference issue. Additionally, during its deliberations, the jury did request further instructions on the reckless indifference issues and this Court sent in an

additional instruction on the issue. This issue was the apparent basis in the jury's mind for the conviction.

This court does have reservations about this particular issue.

It is true that the record contained no order indicating an approval of the amendment and actually ordering that the indictment be amended. The instructions as given, however, clearly reflect the new element which was not contained in the original indictment, and, as noted above by the trial court, it was evidently this part of the instruction upon which the jury returned the verdict. Under these circumstances the court has no alternative but to reverse and remand for further proceedings consistent with this opinion.

Reason For Granting The Petition

It is very clear that from the beginning, the people of Mississippi have ordained that they not be prosecuted for felonies except upon the indictment by a grand jury. It has been the law since 1858 that the court has no power to amend an indictment as to the matters of substance without the concurrence of the grand jury by whom it was found, although amendments as to mere informality may be made by the court. Mc Guire v. State, 35 Miss. 366 (1858). See also Miller v. State, 53 Miss. 403 (1876); Peebles v. State, 55 Miss. 434 (1877); Blumenberg v. State, 55 Miss. 528 (1878). It is refreshing to be able to cite authorities from the last century, and, indeed, from the annotations under the constitutional section and to experience the rare or unusual assurance that in some ways, the law changes slowly or not at all. Later cases cited by the appellant include Van Norman v.

365 So.2d 644 (Miss. 1978) and Kemp v. State, 121 Miss. 580, 83 So. 744 (1920). These cases clearly support the rule above quoted that the State can prosecute only on the indictment returned by the grand jury and that the court has no authority to modify or amend the indictment in any material respect.

The Portion of the Court's Ruling At Issue On This Appeal.

6. Government violates right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct defense. U.S.C.A. Const. Amend. 6.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed. 2d 763 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See e.g., Beders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed. 2d 592 (1976) (bar on attorney-client constitution during overnight recess); Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Guyer v. Sullivan, 446 U.S. at 344, 100 S.Ct. Int. 1716. Id. at 345-350, 100 S.Ct. at 1716-1719 (actual conflict or interest adversely ineffective).

7. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or sentence has two components: first, defendant must show that counsel's performance was deficient, requiring showing that

counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const. Amend. 6.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or sentence admitted into evidence to explain the judge's mental process in reaching his sentencing decision. *Id.* at 1262-1263; see *Jayweather v. Ritch*, 195 U.S. 276, 306-307, 25 S. Ct. 58, 67-68, 49 L. Ed. 193 (1904), that renders the result unreliable.

Conclusion

The petition for a writ of certiorari should be granted, because the evidence did not rise the defensive issue of necessity, and because appellant's counsel failed to request a jury instruction on the issue, the jury was precluded from giving effect to appellant's defense. That in itself undermines

our confidence in the conviction sufficiently to convince the court of the outcome, that the result of the trial might have been different had the instruction been requested and given.

Respectfully submitted,

/s/ Antwone Washington
Antwone Washington

Certified, this the 16 day of Jan 20, 20

Antwone Washington

AFFIANT

Sworn To And Suscribed before...

Jessica Jones

Notary Public

ME This The 16 Day of January 20 20

